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No. 85-44

In The

Supreme Court of the United States

October Term, 1984

RALPH ROGER BERGMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Government can fail to comply with the mandatory requirements of the Privacy Act (5 U.S.C. 552a) relating to notice of appeal rights and then rely on the statute of limitations contained in that Act to preclude judicial review of its action?

2. Whether it is a denial of due process for a statute of limitations to expire before a cause of action under that statute has arisen?

TABLE OF CONTENTS

Pages

Questions Presented i

Table of Contents ii

Table of Authorities iii

Opinions Below 2

Jurisdiction 2

Statutory Provisions Involved 2

Statement Of The Case 6

Reasons For Granting The Writ 7

1. The Decisions Below Represent A Departure From The Accepted And Usual Course Of Judicial Proceedings So Serious That The Exercise Of This Court's Power Of Supervision Is Required. 7

2. Any Interpretation Of A Statute Of Limitations Which Allows It To Expire Before The Procedural Requirements Of The Underlying Statute Are Met Is A Violation Of Due Process. 12

Conclusion 13

Appendix ..... App. 1

TABLE OF AUTHORITIES

CASES:

American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974) 8

Baldwin County Welcome Center v. Brown, 105 S.Ct. 1723 (1984) 10

Block v. North Dakota, 461 U.S. 273 (1983) 8

Crooker v. United States Marshals Service, 577 F. Supp. 1217 (D.D.C. 1983) 12

Exnicious v. United States, 563 F.2d 418 (10th Cir. 1977) 11

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) .. 11

Larsen v. Hoffman, 444 F.Supp. 245 (D.D.C. 1977) 12

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 13

Nagel v. U. S. Department of Health, Education and Welfare, 725 F.2d 1438 (D.C. Cir. 1984) 12

R.R. v. Department of the Army, 482 F.Supp. 770 (D.D.C. 1980) 8, 9

United States v. Kubrick, 444 U.S. 111 ((1979) 8, 9, 11

Wheeler v. Jackson, 137 U.S. 245 (1890) 12, 13

TABLE OF AUTHORITIES—Continued

Pages

OTHER AUTHORITIES:

5 U.S.C. 552a(d)(2)(b) 12
5 U.S.C. 552a(d)(3) 12
5 U.S.C. 552a(g)(1)(c) and (g)(1)(d) 11
28 U.S.C. 1254(1) 2

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vs.

UNITED STATES OF AMERICA,

Respondent.

To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Ralph Bergman, respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit, entered in this proceeding on December 21, 1984.

OPINIONS BELOW

The Order of the Court of Appeals for the Tenth Circuit was entered on December 21, 1984, and appears in the Appendix, and at 751 F.2d 314 (10th Cir. 1984). The opinion of the United States District Court for the District of Colorado was entered on September 20, 1983, and appears in the Appendix.

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JURISDICTION

The Order of the Court of Appeals was entered on December 21, 1984. A Petition for Rehearing or Hearing En Banc was denied on March 14, 1985. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

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STATUTORY PROVISIONS INVOLVED

§552a RECORDS MAINTAINED ON INDIVIDUALS

* * * * *

(d) Access to records

Each agency that maintains a system of records shall—

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him

and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and—

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either—

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency,

and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

* * * * *

(f) Agency rules

In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall—

* * * * *

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

* * * * *

(g)(1) Civil remedies

Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to

the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

* * * * *

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

* * * * *

STATEMENT OF THE CASE

The facts in this case are straightforward and uncontested. Petitioner, Ralph Bergman, was employed by the Department of Commerce from 1962 until 1977. Between November 12, 1976 and December 22, 1980, he made a number of requests for the correction of seven position classifications contained in his personnel records. The correction of these position classifications was necessary if they were to accurately describe revised job descriptions which the Civil Service Commission ordered the Department of Commerce to put in Mr. Bergman's file on November 12, 1976.

Commerce, and subsequently the Office of Personnel Management, refused each request, stating that they had no authority to revise position classifications retroactively. However, none of Mr. Bergman's requests referred to the Privacy Act, and none of the governmental responses either referred to or complied with the mandatory provisions of that Act.

Shortly after learning of the existence of the Privacy Act, Mr. Bergman on October 7, 1982, filed a *pro se* complaint to require that his records be amended and seeking other relief under the Act. After obtaining counsel, Mr. Bergman filed for the first time on March 21, 1983, a formal Privacy Act request for the amendment of his records. This request was processed by the Government in compliance with the Privacy Act, and a final denial of Mr. Bergman's request was issued by the Government on June 10, 1983.

On September 20, 1983, the District Court granted summary judgment for the Government on the basis that

statute of limitations had run. It held that a cause of action did not arise under the Privacy Act when Mr. Bergman had exhausted his administrative remedy under that Act, but rather that a "common sense" approach should be utilized in which the cause of action arose when an error was made in Mr. Bergman's record, he was injured by the error, and he had reason to know of the error and the injury. (App. 13)

This decision was affirmed by the United States Court of Appeals for the Tenth Circuit on December 21, 1984. Mr. Bergman's Petition for a Rehearing or for a Hearing En Banc was denied on March 14, 1985.

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REASONS FOR GRANTING THE WRIT

1. The Decisions Below Represent A Departure From The Accepted And Usual Course Of Judicial Proceedings So Serious That The Exercise Of This Court's Power Of Supervision Is Required.

The burden on this Court from the increasing number of requests for its review should be of serious concern to all petitioners, and certainly is to Mr. Bergman. Rule 17 represents only threshold guidance, and Mr. Bergman is aware that merely repeating a Rule 17 criterion in a headnote only serves to alert the Court to the nature of the argument presented.

To obtain review, a decision below must not only be wrong, it must be dangerously wrong. Mr. Bergman sincerely believes that this case meets that criterion. While the decisions below have done nothing less than empower

the Government to ignore those parts of the Privacy Act it finds a burden while relying on those parts of the Act it finds advantageous, this would not be enough to justify review if these decisions were of narrow applicability. However, the decisions below have rejected all decisions of this Court and the other Circuits concerning the import and purpose of statutes of limitations in general, *see, e.g., United States v. Kubrick,* 444 U.S. 111, 117 (1979), and statutorily-created statutes of limitations in specific, *see, e.g., American Pipe and Construction Co. v. Utah,* 414 U.S. 538, 557-558 (1974). As this Court said most recently in *Block v. North Dakota,* 461 U.S. 273 (1983):

> When Congress attaches conditions to legislation waiving the sovereign immunity of the United States, these conditions will be strictly observed, and exceptions are not to be lightly applied. *Id.* at 287.

Clearly, this premise applies to all parties when Congress defines the procedural steps to be taken by all parties.

Most importantly, the decisions below will serve as a beacon for discord, entangling other Courts in false logic, procedural quicksand, and certain inequity. In circumstances such as these, it is only this Court in the exercise of its supervisory powers which can avoid an incorrect decision of broad applicability.

The danger from this new line of precedent forged from the decisions below is not imagined. Indeed, it can be seen in the decisions appealed which rely almost exclusively on *R.R. v. Department of the Army,* 482 F.Supp. 770 (D.D.C. 1980) in support of their position that a cause of action under the Privacy Act arises independently of

both governmental compliance with the requirements of the Act and exhaustion of administrative remedies by the requestor. Yet, *R.R.* reached the diametrically opposite position from that which the Courts below perceived it to reach. A careful reading of *R.R.* shows that it held that a cause of action under the Privacy Act arose at the earliest when the Army Privacy Review Board denied a request under the Privacy Act even though the plaintiff had previously made nine requests over a twenty-eight year period for the correction of his records. *Id.* at 775, note 12. The misinterpretation by the Courts below could only have resulted from the use of the initials "APRB" in Footnote 12 which obscured the fact that it was the decision of the Army Privacy Review Board which triggered the cause of action.

The danger inherent in the decisions below is even greater. These decisions, which squarely although incorrectly address issues only dealt with in passing by other Courts, have become the cornerstone for new principles of law significantly impinging on the congressionally-mandated rights of individuals under not only the Privacy Act but also other legislation which create rights by statute. This is not a matter of a Court misinterpreting a prior decision as in *R.R.* Rather, the Courts below have issued lodestone decisions attracting new Governmental defenses and judicial decisions supporting those defenses. It is inevitable that this Court, as it did in *United States v. Kubrick, supra,* in relation to other aspects of the statute of limitations issue, will be required in the future to remedy the damage done by the decisions below. Mr. Bergman urges this Court to act now before significant and irreparable damage to him and others occurs.

The significance of the holding below that the statute of limitations in the Privacy Act begins to run regardless of whether the requestor has exhausted his administrative remedies or the Government has complied with the mandatory requirements of the Act reaches far beyond that Act. By analogy, a tort claim is time barred two years after the claim arose rather than six months after it is denied even though the initial claim to the government is timely made. Also by analogy, the filing of a civil rights claim with a state agency has no effect on time in which a Federal EEOC claim may be filed.

This Court recently dealt with a similar issue when it said in *Baldwin County Welcome Center v. Brown,* 105 S.Ct. 1723 (1984):

> Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants. As we stated in *Mohasco Corp. v. Silver,* 447 U.S. 807, 826 (1980), "(i)n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Id.* at 1726.

It seems equally clear that procedural requirements for denying access to the federal courts are not to be disregarded either.

These analogies seem patently impossible. Yet, it is undeniable that the District Court and the Court of Appeals below did hold that a statute of limitations can run before the final administrative act which gives rise to the underlying cause of action takes place. Further, the Courts below did hold that that a number of other claims

cognizable under the Privacy Act are time barred prior to their inception. For example, claims under Section 552a(g)(1)(c) and (g)(1)(d) require an adverse effect to the individual prior to a cause of action arising for which a judicial remedy is available. Nonetheless, both Courts below held that any adverse effects occuring more than two years after the first adverse effect resulting from the inaccurate record were time barred. D.C. Op. App. 16; 10th Cir. Op. App. 5. This holding is of course incorrect, *see, e.g., Havens Realty Corp. v. Coleman,* 455 U.S. 363 (1982). Thus, it is clear that Courts have and likely will in the future utilize the incorrect conclusions of law established below to formulate new decisions equally incorrect and inequitable.

The purpose of a Petition for *Certiorari* is not to argue the law, however. Its purpose is to demonstrate that the error below is of such significance as to warrant the Court's consideration of the merits. These decisions, which stand squarely for the proposition that the statute of limitations for a cause of action can expire prior to that cause of action arising, defy logic. Yet, the principle of *stare decisis* requires that this paradox become a paradigm. Only this Court, acting as it did in *United States v. Kubrick, supra* at 121 note 8, when it overruled the Tenth Circuit on a similar question in *Exnicious v. United States,* 563 F.2d 418 (10th Cir. 1977), can avoid such a result. This Mr. Bergman respectfully petitions the Court to do by granting his petition.

2. Any Interpretation Of A Statute Of Limitations Which Allows It To Expire Before The Procedural Requirements Of The Underlying Statute Are Met Is A Violation Of Due Process.

This Court held long ago that a statute of limitation which "unreasonably limits the opportunity to enforce . . . (a) right by suit" violates the due process guarantees of the Constitution. *Wheeler v. Jackson,* 137 U.S. 245, 258 (1890). The Privacy Act, within its four corners, defines due process. Congress requires an agency:

1. To permit an individual to request the correction of a record pertaining to him.

2. To consider the request.

3. To inform the individual promptly if it refuses to amend the record of its refusal, its reasons therefore, and the specifc procedures established by the agency for a review of that refusal. (Section 552a(d)(2)(b))

4. To give the individual an opportunity to appeal the refusal.

5. To decide the appeal and issue a final determination within 30 days of the appeal.

6. To notify the individual of his or her right to judicial review of the denial. Section 552a(d)(3)

Only then may the individual seek judicial review. *Nagel v. U. S. Department of Health, Education and Welfare,* 725 F.2d, 1438, 1441 (D.C. Cir. 1984); *Larsen v. Hoffman,* 444 F.Supp. 245, 256 (D.D.C. 1977); *Crooker v. United States Marshals Service,* 577 F.Supp. 1217, (D.D.C. 1983), and cases cited therein.

It is uncontested that the government did not advise Mr. Bergman of his right to appeal the initial denial of

his request, did not review that initial determination, and, most importantly, did not advise him of his right of judicial review of the denial. This not only denied him the fundamental fairness implicit in the due process clause of the Constitution, but also the congressionally-defined due process contained in the very Act which established the statute of limitations. Under these circumstances, the application of the statute of limitations in Mr. Bergman's circumstances is, by definition, a denial of due process and an impermissible interpretation of that provision in the Privacy Act since "it unreasonably limits the opportunity to enforce . . . (his) right by suit." *Wheeler v. Jackson, supra* at 258. Cf., *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 436 (1982) where this Court held that the expiration of a right of review because of the failure of the Illinois Fair Employment Practices Commission to hold a timely hearing was a denial of due process.

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CONCLUSION

The decisions below are incorrect as a matter of law and of logic. They violate fundamental principles of due process. Their progeny will increase unless this Court acts. Petitioner Ralph Bergman respectfully requests for these reasons that this Court grant his Petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 83-2426 and 83-2429

RALPH ROGER BERGMAN,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, et al,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Colorado

(D.C. Civil Nos. 82-A-1665 and 82-A-188)

(Filed December 21, 1984)

Frederic W. Schwartz, Jr., Washington, D.C. (Glenn A. Bergmann, Denver, Colorado, with him on the brief), for Plaintiff-Appellant.

Nancy E. Rice, Assistant United States Attorney (Robert N. Miller, U.S. Attorney, with her on the brief), Denver, Colorado, for Defendants-Appellees.

Before LOGAN, BREITENSTEIN, and McWILLIAMS, Circuit Judges.

McWILLIAMS, Circuit Judge.

These two appeals have been companioned in this Court for dispositional purposes. From the record before us, we learn that Ralph Roger Bergman was employed by various agencies within the Department of Commerce at Boulder, Colorado from 1962 to March, 1977. Bergman was temporarily removed from his employment in 1968, and again in 1973, pursuant to Reduction in Force proceedings. In each instance he was, in time, rehired. In

March, 1977, Bergman was retired on disability from his employment in the Department.

In 1976, shortly before his retirement, the Civil Service Commission, now the Office of Personnel Management, conducted an audit of Bergman's work record, and determined that the official position descriptions of the jobs held by Bergman from 1962 to 1976 were inadequate. The Commission then prepared new duty statements for the period in question and ordered the Department to include such in Bergman's official personnel folder. This was done.

Subsequent to his retirement, Bergman asked the Department to reclassify retroactively his earlier work positions in an apparent effort to show, *inter alia,* that he should not have suffered the Reduction in Force proceedings in 1968 and 1973. On October 25, 1977, the Department notified Bergman in writing that it had no power to reclassify positions retroactively in the manner requested by Bergman.

On October 7, 1982, Bergman filed, *pro se,* in the United States District Court for the District of Colorado, an action against the Department of Commerce under the Privacy Act, 5 U.S.C. § 552(a), alleging that the Department had unlawfully refused to "correct" his classification records for which wrong he sought injunctive relief and $200,000 in monetary damages.[1] The Department responded with a motion to dismiss, or, in the alternative, for summary judgment, contending, *inter alia,*

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[1] In 1978, Bergman had filed a similar action in the U.S. Court of Claims. This action was dismissed, in part because the Court of Claims lacked subject matter jurisdiction to award back pay or reclassify employee positions. Bergman v. United States, No. 84-78 (Ct. Cl. June 16, 1982), *aff'd,* Appeal No. 84-78 (Fed. Cir. January 10, 1983).

that the action was barred by the two-year statute of limitations set forth in 5 U.S.C. § 552(a) (g) (1) (5). The district court, on September 20, 1983, entered summary judgment in favor of the Department, holding that the action was time barred. The district court's Memorandum was not published.

On February 4, 1983, Bergman filed, *pro se,* a separate and second action in the United States District Court for the District of Colorado against the Department of Commerce under the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.,* alleging that employees of the Department of Commerce, while acting within the scope of their employment, violated certain non-discretionary, regulatory and statutory mandates resulting in economic, physical and psychological harm for which he sought $750,000. The Department responded with a motion to dismiss, or, in the alternative, for summary judgment, contending, *inter alia,* that the action, as pleaded, did not come within the purview of the Federal Tort Claims Act. On July 25, 1983, the district court granted the Department's motion and entered summary judgment in its favor. The district court's Memorandum Opinion and Order appears at 567 F. Supp. 460 (D. Colo. 1983).

Bergman appeals both of the adverse judgments sustained by him in the district court. Appeal No. 83-2426 relates to the action brought under the Privacy Act. Appeal No. 83-2429 relates to the action brought under the Federal Torts Claim Act. Before considering separately these two appeals, we note that the complaints in each

underlying action were filed *pro se,* and, as did the district court, we find them somewhat difficult to track.

No. 83-2426 (Privacy Act)

As stated, the district court granted summary judgment in favor of the Department of Commerce as concerns Bergman's cause of action based on the Privacy Act. The gist of Bergman's initial complaint was that the Department refused his request to amend and "correct" retroactively his employment records. 5 U.S.C. § 552a(g) (1) (C) allows an individual to sue whenever an agency fails to maintain an employment record "with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to . . . benefits to the individual. . . ." 5 U.S.C. § 552a(g) (1) (5) provides that an action under the section may be brought "within two years from the date on which the cause of action arises." In ascertaining when Bergman's cause of action arose, the district court held that it arose at the time: 1) an error was made in maintaining Bergman's records; 2) Bergman was wronged by such error; and 3) Bergman either knew or had reason to know of such error. The district court held that in the instant case all three conditions were met, at the very latest, on October 25, 1977, when the Department notified Bergman in writing that the Department could not retroactively classify job positions, grant him "monetary relief," or pay his legal fees or other expenses, or otherwise reconsider the 1973 Reduction in Force discharge. The underlying action in No. 83-2426 was not instituted until October 7, 1982, almost five years after the letter was sent to Bergman by the Department. We find no

error in the district court's analysis of this matter. In support of the action taken, *see* Oppenheim v. Campbell, 571 F.2d 660 (D.C. Cir. 1978), where the D.C. Circuit held that a similar action, though not identical to the one asserted here by Bergman, arose when the plaintiff's "right to resort to federal court was perfected." *See also,* R.R. v. Department of Army, 482 F. Supp. 770, 774, n. 12 (D.C. D.C. 1980) (holding that a "cause of action for damages occurred only when the VA denied [the plaintiff] benefits in reliance on incorrect Army records").

Bergman would avoid the ruling of the district court by asserting that the 1977 letter did not, with finality, trigger the two-year statute, and that a new cause of action arose upon each and every subsequent adverse determination based on erroneous records. In this regard, Bergman, by a supplemental complaint, alleged that as recently as March 21, 1983, he had renewed his request of the Department for reclassification, and that his renewed request had been denied. The district court rejected this argument, as do we. To subscribe to such would, in practical effect mean that the two-year statute would never run. *See, e.g.,* Oppenheim v. Campbell, 571 F.2d at 662 (plaintiff's claim accrues when he is "first harmed"); Ward v. Caulk, 650 F.2d 1144, 1147 (9th Cir. 1981) ("A continuing violation is occasioned by continual unlawful acts, not by continual ill effects from the original violation").

No. 83-2429 (Tort Claim)

This appeal concerns Bergman's *pro se* complaint based on the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.* Again, the complaint is hard to follow. However,

in granting the Department's summary judgment, the district court gave Bergman the benefit of any doubt and interpreted it as alleging not only an action sounding in tort, but also as an action based on an implied cause of action arising out of a breach of statutory duty, as well as an action based on intentional infliction of emotional distress. As concerns each, the district court held as follows: 1) Bergman's claim based on negligence is actually one for "misrepresentation, deceit and slander" and therefore is barred by the immunity retained under 28 U.S.C. § 2680(h), *see* Wine v. United States, 705 F.2d 366 (10th Cir. 1983); 2) There is no implied cause of action since Congress had already expressly created a variety of administrative and judicial remedies "to cover the problem," *see* Northwest Airlines, Inc. v. Transport Workers Union of America, 451 U.S. 77, 97 (1981) ("The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement"); and 3) that while a claim for intentional infliction of emotional distress may be barred by 28 U.S.C. § 2680(h),[2] in any event, Bergman's allegations in his complaint and "documentary evidence" do not make out a claim of intentional infliction of emotional distress under Colorado law, which requires "outrageous conduct" which is "so extreme in degree as to go beyond all bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community," Tremble v. Denver, 645 P.2d 279, 282 (Colo. App. 1981).

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[2] 28 U.S.C. § 2680(h) retains sovereign immunity from claims based on intentional torts. Several courts, however, have held that claims for intentional infliction of emotional distress are not barred by § 2680(h). *See, e.g.*, Gross v. United States, 676 F.2d 295 (8th Cir. 1982).

We are in complete accord with the reasoning and result reached by the district court, and on that basis, we affirm.

Judgment affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action 82-A-1665

RALPH ROGER BERGMAN,

Plaintiff,

v.

UNITED STATES OF AMERICA and
UNITED STATES DEPARTMENT OF COMMERCE

Defendants.

ORDER ON MOTION FOR SUMMARY JUDGMENT

(Filed September 20, 1983)

This matter is presently before the court on defendants' motion for summary judgment and plaintiff's motion for partial summary judgment.

Defendants had previously filed a motion to dismiss plaintiff's complaint on the ground that it was barred by the applicable statute of limitations. A hearing was held on that motion on July 21, 1983. Because matters outside the pleadings were presented, I advised the parties that I would treat the motion as a motion for summary judgment. Plaintiff was given fifteen days in which to present

all material made pertinent to such a motion by Rule 56. Defendants were given six days thereafter to present any additional pertinent material.

Plaintiff filed nothing in opposition to defendants' motion, but on August 2, 1983, he filed a supplemental complaint. In the supplemental complaint he asserted that on March 21, 1983, he requested under 5 U.S.C. § 552a that the classification designation of his duty statement from October 1962 to August 1973 be corrected. That request was denied. He further asserts that he has exhausted all administrative remedies and that the proper classification of 'the duty statements in question has not been adjudicated either before the Civil Service Commission or the Court of Claims.' He seeks injunctive relief and damages. On August 16 he filed a motion for partial summary judgment asserting that as a matter of law, defendants were liable under the Privacy Act (5 U.S.C. § 552a). This motion was supported by an affidavit, exhibits and a brief.

Oral argument was had on September 13, 1983, and the issues are ripe for disposition.

BACKGROUND

Plaintiff was employed a physicist for the U.S. Department of Commerce in Boulder, Colorado, from 1962 to 1977, with certain interruptions. His employment was terminated twice in Reduction in Force (RIF) proceedings, once in 1968 and once in 1973. He was reinstated in 1975 and retired because of medical disability in 1977.

Bergman appealed his RIF separations in several administrative hearings. As a result of the hearings, he was offered a new position in 1975, which was not the position

he sought. He found the workk tedious and frustrating, experienced health problems which he considered to be related to the work, and applied for medical disability retirement in December of 1976.

The Court of Claims denied relief in a trial judge's recommended decision and conclusion of law that was recently affirmed. Exh. 1 to First Motion to Dismiss; Supplemental Authority in Support of Second Motion to Dismiss. The opinion reached the merits of most of plaintiff's claims and denied relief. However, the Court of Claims ruled that it was without jurisdiction to consider Bergman's claims for reclassification, for reinstatement, and for back pay based on the salary differences between the grade levels assigned to his jobs and the grade levels plaintiff believes should have been assigned to those positions. Ct. Clm. Op. at 23. The Court of Claims noted that "despite plaintiff's persistence in raising [the] issue of inaccurate official position descriptions through various informal and irregular channels, plaintiff has never undertaken a formal classification appeal by which the misclassification and position description issues could be resolved." Ct. Clm. Op. at 27. *See also* Finding 91 at 71.

In this court, plaintiff asserts Privacy Act claims under 5 U.S.C. § 552a(g)(1)(A), (C) and (D), and § 552a(g)(4) for damages and under § 552a(g)(2)(A) for injunction ordering the Office of Personnel Management and the Department of Commerce to "correct" his classification records. The damage claim is apparently grounded on the motion that an erroneous determination was made adversely to him in the Court of Claims because of the erroneous classification records.

In 1976, the Civil Service Commission (now the Office of Personnel Management) conducted an audit of Bergman's work record. It determined on November 5, 1976, that the official position descriptions of the jobs held by him from 1962 to 1976 were inadequate because they were too broad and vague. The Commission prepared new duty statements for that period and ordered the Department of Commerce to include them in Bergman's official personnel folder; this was done.

Bergman asked the Civil Service Commission and the Department of Commerce to reclassify his job positions (to determine the competitive level, the series, and the applicable grade for each position). They refused. In a letter of October 25, 1977, the Department of Commerce asserted it had no power to classify positions retroactively, and that even had he been reclassified as an Electronic Engineer as he had requested, it would not have changed the outcome of his 1973 RIF proceedings. Bergman alleges that the Department of Commerce admitted in 1981 that his classifications were erroneous.

In 1978, Bergman brought suit in the Court of Claims challenging the validity of each RIF separation, asserting that his disability retirement was caused by unlawful coercion, and asserting that his job positions had been misclassified, causing him to receive a lower salary than that to which he had been entitled. His complaint in the Court of Claims sought reinstatement, correction of his personnel records, back pay, and other benefits. With regard to the misclassification, Bergman claimed that he should have been classified as an Electronics Engineer rather than a Physicist, and that this misclassification prejudiced him in the 1973 RIF proceedings.

DEFENDANTS' MOTION

The government contends simply that since all of the personnel records Bergman complains about were created between 1962 and 1977, the two-year statute of limitations, 5 U.S.C. § 552a(g)(5), has expired. The government also contends that the filing of a suit in the Court of Claims had no effect on the running of the limitations period.

PLAINTIFFS' RESPONSE

Plaintiff's rebuttal is that a Privacy Act cause of action does not arise simply at the time an incorrect document is created, but rather at the time the Act is violated.

Section 552a(g)(1)(A) provides that an individual may bring a civil action whenever any agency

> makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in confirmity with that subsection.

Bergman asserts that his cause of action under this provision arose when the determination not to amend the records was made, and that this determination was made by the government in January 1981 when it opposed Bergman's motion in the Court of Claims to remand the classification issue to the Office of Personnel Management. Thus, he concludes, the cause of action arose in January of 1981.

Section 552a(g)(1)(C) allows an individual to sue whenever an agency

> fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character,

> rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual.

Bergman contends that a cause of action under this section arises upon each and every adverse determination that results from maintenance of the inaccurate record. Therefore, he concludes that a cause of action arose on June 16, 1982, the date of the Court of Claims opinion.

Section 552a(g)(1)(D) allows an individual to sue when an agency

> fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on [the] individual.

Other provisions of the Act include § 552a(e) (5) and (6), which require agencies to keep accurate records and confirm their accuracy before disseminating them, according to plaintiff. Bergman determines that his cause of action under these provisions is "continuing", and also that dissemination of false records to the Court of Claims in 1981 gave rise to a new cause of action on that date.

On March 22, 1983 (while this action was pending), plaintiff again requested that his record be amended by reclassifying his duty statement. The appeal of that request was denied on June 10, 1983. On August 2, 1983, plaintiff filed a supplemental complaint, alleging this request and its denial and asserts that 'serves to vest jurisdiction in this Court.'

DISCUSSION

Bergman's argument is somewhat intriguing. It is obvious that a cause of action does not arise, for purposes of the statute of limitations, as soon as an erroneous record is made. At that point the individual is not aware of the record, and until the record is used in some way, or the government refuses to correct the information, the conditions specified as giving rise to a cause of action in § 552a(f)(1)(A) through (D) have not been satisfied.

Few opinions concerning the Privacy Act are reported and I have found but one opinion dealing with the question of when a cause of action arises for purposes of the limitations period. In *R.R. v. Department of the Army*, 482 F. Supp. 770, 774 n. 12 (D.D.C. 1980), the court concluded that a claim for damages resulting from the Army's refusal to amend an inaccurate medical report arose when the Veterans Administration denied the plaintiff benefits in reliance on the report.

All of Bergman's Privacy Act causes of action can be considered together in determining when they accrued. Using common sense and applying the policies of statutes of limitations in general, a cause of action under each applicable provision should be deemed to accrue at the time an error has been made, the plaintiff has been wronged by it, and the plaintiff knows or has reason to know of these facts.

In Bergman's case, all of these events occurred by October 25, 1977, when the Assistant Secretary of Commerce for Administration, Ms. Elsa Porter, wrote Bergman a letter stating in part as follows:

> I have reviewed the report of the Office of Audits concerning the reduction-in-force actions affecting your past employment with the Department. I understand that you have a copy of the report.
>
> I have been advised by legal counsel that the Department has no authority to grant monetary relief to employees in circumstances like yours. Agencies cannot retroactively classify positions and cannot pay the legal or other expenses of employees arising out of their personal efforts to obtain redress for grievances.
>
> Insofar as it can reasonably be done at this time, I have had the 1973 reduction-in-force reconstructed. It appears clear from this that you would have been similarly affected by the 1973 RIF if you had been classified as an Engineer at the time. You may find the enclosed copies of records useful in understanding this.
>
> As you know, the November 1976 report of the Denver Region Civil Service Commission office was placed in your official personnel folder file, to show for all future record purposes what work you did and what professional skills you employed. I see no need to take any further action concerning this aspect of your employment.

In this letter (if not before) the Department told Bergman that it would not reclassify his position, grant him "monetary relief" and pay his legal or other expenses, or reconsider the 1973 RIF discharge.

If one chooses to analyze each provision of the Privacy Act under which Bergman claims to have a cause of action separately, the same result is reached. His claim under § 522a(g) (1) (A) (for the agency's failure to amend his records upon request) is more than two years old because Bergman requested a classification change as early as 1967, and continued to raise this complaint by irregular

means. It is unclear when Bergman first requested and was denied reclassification of all of his positions (from 1962 to 1973), but surely his complaint in the Courts of Claims constituted a request to amend those records, under the Act. The government made "a determination not to amend" the records, even if it did not issue a formal refusal to amend. *See Liguori v. Alexander,* 495 F. Supp. 641, 646 (S.D.N.Y. 1980) (silence of agency and certain other actions amounted to a determination not to amend). The Court of Claims complaint was filed March 15, 1978. When this demand for reclassification was not honored, Bergman's two year limitation period began to run (if it had not already). His 1982 suit in this court was therefore not timely as to § 552a(g)(1)(A).

Bergman's cause of action for violation of § 552a(g)(1)(C) (failure to keep accurate records, causing a determination adverse to the individual) seems to be founded on the assertion that the Court of Claims would have awarded him back pay had his classification records been corrected. The "adverse determination" about which Bergman complains is the determination that he was not entitled to a higher salary than he received when he worked for the Department. But this determination was made by the Department when it paid his salary in the first place. Therefore a cause of action regarding this "adverse determination" arose (if at all) while he was employed. Bergman cannot restart the limitations period just by going to a court and obtaining a ruling that the court does not have power to award him back pay; and he cannot restart the limitation period by again requesting relief through administrative procedures months after seeking relief in this court.

Plaintiff suggests that the "adverse determination" in the Court of Claims was the court's ruling that his 1973 RIF was proper. (He contended in the Court of Claims that the misclassification had prejudiced him in his exercise of RIF displacement, or "bumping" rights.) If this is the relevant "adverse determination" for purposes of § 552a(g)(1)(C), then this determination was first made during the 1973 RIF, when Bergman's bumping rights were determined on the basis of his existing classifications. An apparently final administrative ruling on this question was made on September 2, 1977, when the Office of Audits determined that Bergman had not been disadvantaged in the 1973 RIF by his classification. All of these events occurred more than two years before the filing of the complaint.

Bergman argues that a new cause of action arises upon each and every adverse determination based on erroneous records. This cannot be true; otherwise each decision on the same issue in any forum would restart the running of the statute of limitations period, and the purpose of the statute would be frustrated. The limitations period begins to run when the *first* adverse determination based on the records is made, and subsequent adverse determinations do not start the period over again, at least where the subsequent determinations involve the same rights (e.g., compensation, displacement rights) as were involved in the first determination.

Bergman's asserted cause of action under § 552a(g)(1)(D) (failure to comply with any other provision of this section in such a way as to have an adverse effect on the individual) is indistinguishable from his claims under §§ 552a(g)(1)(A) and (C). If there was an "adverse effect"

on Bergman, giving him a § 552a(g)(1)(D) cause of action, it arose a long time ago, whenever the "adverse determination(s)" occurred. The fact that the adverse effect may be a continuing one does not, as plaintiff argues, mean that the statute of limitations never runs out on this cause of action.

The statute of limitations was not tolled on any of Bergman's Privacy Act claims by his filing of suit in the Court of Claims. The general rule is that filing an action in a court that clearly lacks subject matter jurisdiction will not toll a federal statute of limitations. *Fox v. Eaton Corp.*, 615 F.2d 716, 719 (6th Cir. 1980); *cert. denied* 450 U.S. 935 (1981). The statute of limitations is tolled, however, if the plaintiff acted under a reasonable assumption that the court in which the suit was initially filed had jurisdiction over his claim. *Fox, supra* at 719-720. It is also tolled where the initial suit was filed in a district court of competent jurisdiction but of improper venue, *Goldlawr, Inc. v. Heiman,* 369 U.S. 463, 82 S.Ct. 913 (1962), and in other extraordinary circumstances in which the plaintiff has been prevented from asserting his rights. *Burnett v. New York Central R.R. Co.,* 380 U.S. 424, 428-29, 85 S.Ct. 1050 (1965); *Leake v. University of Cincinnati,* 605 F.2d 255 (6th Cir. 1979).

Plaintiff Bergman's suit does not fall within any of the exceptions to the general rule that filing in a court without subject matter jurisdiction does not toll the statute of limitations. Specifically, he was not reasonable in assuming that the Court of Claims had jurisdiction to grant the relief he now requests from this court. In *U.S. v. Testan,* 424 U.S. 392 (1976), the Supreme Court ruled

squarely that the Court of Claims does not have jurisdiction to order the reclassification of government positions and award back pay based upon such a reclassification. The Privacy Act clearly does not confer such jurisdiction on the Court of Claims. Therefore plaintiff's decision to sue only in the Court of Claims was a strategic error that will not trigger equitable tolling principles.

CONCLUSION

I find there is no genuine issue as to any material fact. I conclude that plaintiff's cause of action is barred by the Statute of Limitations, 5 U.S. § 552a(g)(5). Accordingly it is

ORDERED that plaintiff's motion for partial summary judgment is denied. It is further

ORDERED that defendants' motion for summary judgment is granted and the Clerk shall enter a judgment dismissing the plaintiff's claims and for the award of defendants' costs.

DATED at Denver, Colorado, this 20th day of September 1983.

BY THE COURT:

/s/ Alfred A. Arraj, Judge
United States District Court

Supreme Court, U.S.
FILED
OCT 11 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-44 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1985

RALPH ROGER BERGMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Page

Cases:

Bergman v. *United States*, No. 84-78 (Ct. Cl. June 16, 1982), aff'd, 706 F.2d 319 ..... 2, 3

Leib v. *Veterans Administration*, 546 F. Supp. 758 6

Nagel v. *United States Dep't of Health, Educ. & Welfare*, 725 F.2d 1438 ..... 4, 6

Rogers v. *United States Dep't of Labor*, 607 F. Supp. 697 6

Turner v. *Dep't of the Army*, 447 F. Supp. 1207, aff'd, 593 F.2d 1372 6

Statutes:

Privacy Act, 5 U.S.C. 552a 1, 3

5 U.S.C. 552a(d)(2) 3

5 U.S.C. 552a(d)(3) 3, 4, 6

5 U.S.C. 552a(g)(1)(A) 4, 5, 6

5 U.S.C. 552a(g)(1)(C) 4, 5

5 U.S.C. 552a(g)(1)(D) 4

5 U.S.C. 552a(g)(4) 4

5 U.S.C. 552a(g)(5) 1, 3

28 U.S.C. 2501 2

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RALPH ROGER BERGMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This case is part of a continuing effort by petitioner, a former employee of the United States Department of Commerce, to obtain retroactive amendments of the official position descriptions for several of the positions he held while employed by the Department. In this action, petitioner alleged that the Department had violated the Privacy Act, 5 U.S.C. 552a, by refusing to amend his former position descriptions.[1] Petitioner sought injunctive relief and $200,000 in damages. The courts below held that petitioner's suit was barred by the Privacy Act's two-year statute of limitations (5 U.S.C. 552a(g)(5)).

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[1]In addition to the present action and the Court of Claims litigation discussed herein, petitioner has recently filed another suit under the Privacy Act, based on the same underlying facts, in another district court. *Bergman* v. *United States,* Civ. No. 85-1888 (D.D.C. filed June 10, 1985).

1. Petitioner was employed by the Department of Commerce from 1962 until 1977, when he took a disability retirement. Petitioner was twice separated from employment as a result of reductions in force (RIFs) at the Department; the first separation lasted for a few months in 1968 and the second occurred between 1973 and 1975. Petitioner challenged, administratively and before the former Court of Claims, the actions taken with respect to him in both RIFs. One of petitioner's many contentions was that inaccuracies in the official descriptions of his duties at various times prejudiced his ability to avoid separation by transferring to other positions for which he claimed to have been qualified. The Court of Claims rejected petitioner's challenge, ruling that the claim based on the 1968 RIF was barred by the applicable six-year statute of limitations (28 U.S.C. 2501) and upholding on the merits the underlying actions of the Department of Commerce and the former Civil Service Commission with respect to the 1973 RIF. *Bergman* v. *United States,* No. 84-78 (June 16, 1982), aff'd, 706 F.2d 319 (Fed. Cir. 1983) (Table).[2] In particular, the Court of Claims noted that petitioner had never, while employed by the Department, undertaken a formal classification appeal under available procedures (slip op. 27) and that, in any event, petitioner had suffered no prejudice as a result of the challenged position descriptions (*id.* at 29).[3]

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[2]With respect to various other claims raised by petitioner in the Court of Claims litigation, the court held that it lacked jurisdiction to order petitioner's reinstatement or to award retroactive back pay based on petitioner's claim that every position he had held since 1968 should have been classified at a higher grade level. *Bergman,* slip op. 23. These rulings are not at issue in the instant litigation.

[3]The court's conclusion was based on the fact that the Civil Service Commission had earlier reviewed petitioner's position descriptions, found them insufficiently detailed in certain respects, and ordered them corrected. As a result of the corrections, it was determined that, at the

In October 1982, petitioner filed the present action in the United States District Court for the District of Colorado. Petitioner's factual allegations were the same as before, but, for the first time, he based his claim on the Privacy Act, 5 U.S.C. 552a. In addition to damages, petitioner sought an injunction ordering the amendment of the position descriptions in his personnel records. Even at the time of filing this action, however, petitioner had not yet filed a formal administrative request for amendment of his records, as provided for in subsections (d)(2) and (d)(3) of the Privacy Act, 5 U.S.C. 552a(d)(2) and (d)(3). Petitioner made such a request on March 22, 1983, and the request was finally denied on June 10, 1983.

After allowing petitioner to amend his complaint to reflect the formal Privacy Act request and denial, the district court granted the government's motion for summary judgment (Pet. App. 7-18). The court held that petitioner's Privacy Act claims were barred by the Act's two-year statute of limitations (5 U.S.C. 552a(g)(5)) (Pet. App. 13-18). The court of appeals affirmed (*id.* at 1-7).[4]

2. Despite petitioner's extravagant claims that the decision below is "dangerously wrong" and will be a "beacon for discord" (Pet. 7, 8), the decision of the court of appeals is

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time of the 1973 RIF, petitioner was qualified for electronics engineering positions at the GS-7 level. Such a position was subsequently offered to and accepted by petitioner in 1975, with back pay and other benefits restored for the period dating from the 1973 RIF. *Bergman*, slip op. 28-29. Petitioner has persisted in his complaints, however, because the position he was offered and accepted in 1975 was not the one he wanted.

[4]The court of appeals also affirmed the district court's grant of summary judgment to the government on petitioner's separate action under the Federal Tort Claims Act, which was again based on the same underlying facts (Pet. App. 5-7). Petitioner does not challenge that ruling in this Court.

correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

a. Petitioner's basic argument is that the lower courts erroneously held that the Privacy Act's statute of limitations begins to run even before the requestor has exhausted his administrative remedies (Pet. 10, 12-13). If this were a correct statement of the holding below as applied to the facts of this case, we might agree with petitioner that the result could be considered anomalous. But petitioner has failed to distinguish his two separate causes of action under the Privacy Act, and he has utterly failed to acknowledge his own dilatory conduct in raising his Privacy Act claims. When placed in proper context, it is clear that the court of appeals correctly decided this case.

As an initial matter, it is important to understand the distinction between actions for damages and actions for injunctive relief under the Privacy Act. Subsection (g)(4) of the Act, 5 U.S.C. 552a(g)(4), when read in conjunction with subsections (g)(1)(C) and (g)(1)(D), 5 U.S.C. 552a(g)(1)(C) and (g)(1)(D), authorizes individuals who have been subjected to adverse determinations or actions as a result of an agency's failure properly to maintain its records or otherwise comply with the Act to bring an action for damages. The right to maintain such an action is not tied to any specific administrative procedures, but is instead triggered by adverse agency actions or other adverse effects resulting from violations of the Act's substantive provisions. See *Nagel* v. *United States Dep't of Health, Educ. & Welfare,* 725 F.2d 1438, 1441 n.2 (D.C. Cir. 1984). On the other hand, subsection (g)(1)(A) of the Act, 5 U.S.C. 552a(g)(1)(A), authorizes an individual to bring an injunctive action seeking the correction of records. Such an action is specifically tied to the administrative procedures for the correction of records provided in subsection (d)(3), 5 U.S.C. 552a(d)(3). *Nagel,* 725 F.2d at 1440-1441.

The basis for petitioner's argument is his apparent belief (Pet. 12) that the statute of limitations for *all* of his claims did not begin to run until the completion of administrative procedures, even if, as in the case of his claim for damages, there were no administrative procedures to exhaust. This erroneous premise, for which petitioner cites no authority, was correctly rejected by the courts below. The court of appeals recognized (Pet. App. 4) that the gist of petitioner's complaint was a claim for damages under subsection (g)(1)(C), on the theory that the allegedly incorrect position descriptions led to the Department's adverse determinations with respect to petitioner's employment. The court held (Pet. App. 4-5) that the limitations period for such a claim begins upon the adverse determination in question or at such later time as the claimant knew or should have known of that adverse determination. The court of appeals recognized (Pet. App. 5) that running the limitations period for damages actions under the Privacy Act from any event other than the underlying adverse determination—such as the subsequent adjudication in the Court of Claims or petitioner's belated formal invocation of the Privacy Act—would allow plaintiffs to extend or even revive the limitations period at will. Accordingly, since the adverse determinations in this case took place years ago—in 1968 and 1973—the statute of limitations had long since expired when the present action was filed.[5]

b. Although the court of appeals did not explicitly address petitioner's claim for injunctive relief under subsection (g)(1)(A), 5 U.S.C. 552a(g)(1)(A), the court's implicit rejection of that claim was amply justified. The underlying

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[5]As the court of appeals pointed out (Pet. App. 4), the result is the same even if one indulges petitioner so far as to assume that the statute of limitations did not begin to run until the Department of Commerce denied petitioner's post-retirement request for retroactive reclassification, made in October 1977.

records that petitioner seeks to have corrected—position descriptions pertaining to petitioner's work while employed at the Department of Commerce—date from 1962 to 1977. Petitioner waited five years from the creation of the latest record in question to file this Privacy Act suit, and he did not invoke the Act's administrative procedures until after this action was pending.

We agree with petitioner's assertion (Pet. 12) that a person seeking review under subsection (g)(1)(A) of an agency's decision not to correct contested records must, prior to litigation, exhaust the administrative procedures set forth in subsection (d)(3). See *Nagel,* 725 F.2d at 1441. That principle is not implicated here, however, because of petitioner's failure to take *any* action to invoke the Privacy Act's administrative procedures within the period specified for the bringing of suit. As with his claim for damages, acceptance of petitioner's argument in the context of his action for injunctive relief would make a nullity of the Privacy Act's statute of limitations by permitting a litigant to stave off the running of the two-year period by waiting indefinitely to invoke the Act's administrative procedures. Petitioner has advanced no plausible basis for such a construction of the Act.[6]

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[6]In any event, it is questionable whether petitioner has stated a claim cognizable under the Privacy Act, because the relief he seeks is the amendment of subjective personnel classifications, for which other administrative relief was available. See *Rogers* v. *United States Dep't of Labor,* 607 F. Supp. 697 (N.D. Cal. 1985); *Turner* v. *Dep't of the Army,* 447 F. Supp. 1207, 1212 (D.D.C. 1978), aff'd, 593 F.2d 1372 (D.C. Cir. 1979) (Table); cf. *Leib* v. *Veterans Administration,* 546 F. Supp. 758, 761-762 (D.D.C. 1982) (citation omitted) (Privacy Act not intended to be a " 'backdoor mechanism' to subvert the finality of agency determinations.").

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

OCTOBER 1985

DOJ-1985-10